NO. 49682-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM J. JOHNSON,

Appellant.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

William Johnson was convicted by jury of three of the five counts alleged in a fourth amended information. The amended information included two separate counts of felony violation of a protection order, one by assault and the other by simple proximity and contact, two counts of tampering with a witness, and one count of misdemeanor obstructing an officer. The felony violations of a protection order and the obstructing a police officer reflected actions taken by Mr. Johnson between July 3rd and 4th, 2016.

Angela Lingle and William Johnson were in a domestic relationship for eight years. RP 91-2. They have a daughter Amiya, and a dog. The relationship can be great when Johnson is sober. When Johnson uses methamphetamine, he becomes mentally, emotionally, and physically abusive, and the relationship is scary, traumatic, and abusive. RP 92. This has occurred for a long time because Angela cannot leave—she loves him, sees the good in him, and because they have the child in common. RP 92-3. Johnson's abuse of Lingle resulted in several domestic violence convictions, and the imposition of a No-Contact Order (NCO), which Johnson previously violated. RP 93.

The NCO permits contact outside Lingle's residence in public places only. Both parties were present when the order was entered and both

have a copy of the order. RP 94. Lingle observed "public places" to mean "outside, in [the courthouse], a park, a mall, a movie theater. Somewhere there's going to be other people." RP 94. She also observed that an apartment was not a public place. RP 95. Still, the two lived in violation of the NCO at 220 Cypress, Longview, Washington, for nearly six months. RP 95-6.

On July 4th, 2016, Johnson assaulted Lingle in violation of the NCO. Lingle arose that morning to get ready for work, only to see that Johnson was high and agitated. RP 97-8. Lingle went into the bathroom to avoid Johnson and locked the door. RP 98. Johnson kicked in the door, grabbed Lingle by the face, and shoved her so hard that that Lingle was forced to grab the wall to prevent herself from falling into the bathtub. RP 98. Lingle told him to leave because she did not want to call the police on him. RP 98. She then left the bathroom and Johnson grabbed her by the arm. RP 98-9. Johnson grabbed Lingle so forcefully he left painful bruises. RP 101. Johnson then hit Lingle in the back of the head and her ear as she tried to call 911, which resulted in her ear bleeding. RP 102-3. Lingle eventually called 911. RP 105-10. During that phone call, Lingle informed dispatch Johnson would not likely exit the house. RP 108. She felt it was a "psychotic situation that could've escalated worse than it did" if she had not called 911. RP 137.

Officers arrived at the apartment Johnson shared with Lingle. They made contact with Johnson, who refused to exit the apartment, despite officer commands. During the entire interaction, officers attempted to maintain visual contact with Johnson. However, Johnson moved from room to room, and they feared he may have armed himself. RP 69. There was concern he may have armed himself with a knife. RP 69. After repeated attempts to entice Johnson from the apartment with commands, officers opted to enter and remove him through force.

Johnson previously violated the NCO a week prior to July 4th, 2016. RP 111-12. Johnson admitted on a jail call that he violated the NCO July 3rd, 2017. RP 140. After minimizing the contact, Lingle did admit that contact occurred on July 3rd, 2017, within the apartment in violation of the NCO. RP 140.

At trial, Lingle testified that Johnson implied that nothing could be done to him if witnesses did not show up for trial. RP 113. She took that to mean he asked her not to talk to the prosecution. RP 113. Several jail phone calls were played in support of and to contradict some of Lingle's testimony. At one point, the State mistakenly played a few minutes of a jail call, which provided nothing of any value to its case. Still, once the mistake was observed, the State requested the court admonish the jurors to disregard that

call. Ultimately, Johnson was acquitted of the two counts of Tampering with a witness.

II. ARGUMENT

1. Johnson was not entitled to a lesser included instruction

The right to a lesser included offense instruction is statutory, codified at RCW 10.61.006. To determine whether a party is entitled to an instruction on a lesser included offense under RCW 10.61.006, the Supreme Court set out a two-pronged test in *State v. Workman*, 90 Wash.2d 443, 447-48, 584 P.2d 382 (1978). Following the first prong of the test (the legal prong), a court asks whether the lesser included offense consists solely of elements that are necessary to conviction of the greater, charged offense. Id. Following the second prong (the factual prong), a court asks whether the evidence presented in the case supports an inference that only the lesser offense was committed, to the exclusion of the greater, charged offense. Id at 448, 584 P.2d 382. The requesting party is entitled to the lesser included offense instruction when the answer to both questions is yes. Id.

Legally, an assault in violation of a no-contact order is an element that enhances the violation, it is not necessary for a violation to occur. Johnson was charged in count I with a felony violation of a no-contact order,

by intentional assault. The elements of that crime are set out in the charging document:

> The defendant, in the County of Cowlitz, State of Washington, on or about 7/4/2016, did willfully violate a valid No Contact Order, said order issued by Clark County Superior Court, 14-1-01872-0, issued on November 21, 2014, and amended on September 1, 2015, and after having acknowledged notice of such order, did intentionally assault Angela Lingle, a family or household member, contrary to RCW 10.99.050, 26.50.110, 10.99.010(1) and RCW 10.99.040 against the peace and dignity of the State of Washington. CP 26

Mere contact with the protected party is a violation, the assault elevates that violation to felony. RCW 26.50.110(4) states that any assault that is in violation of an order issued under RCW 26.50 and RCW 10.99 that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony. This provision elevates what might normally be a gross misdemeanor to a felony violation. *State v. Ward*, 148 Wash.2d 803, 810-11, 64 P.3d 640 (2003). The purpose of this penalty enhancement is to protect victims of domestic violence, who are subject of a domestic violence no-contact order. RCW 10.99.010; Ward, 148 Wash.2d at 810, 64 P.3d 640. Therefore the language of the statute serves to explain that all assaults in violation of a no-contact order will be penalized as felonies. Id at 813. While the assault is a necessary element to the enhancement of the crime, it is not necessary for the commission of a

violation of a no-contact order. Necessary to both crimes is the existence of a No-contact order.

When applying *Workman's* factual prong, a court must view the supporting evidence in the light most favorable to the party requesting the lesser included offense instruction. *State v. Fernandez-Medina*, 11 Wash.2d 448, 455-56, 6.P3d 1150 (2000).

Johnson cites *State v. Balderas-Ramos*, 133 Wash.App 1030 (2006), an unpublished case, to support his argument that a lesser included instruction for assault in the fourth degree should have been provided by the court. There, after being acquitted of felony violation of a no-contact order, the defendant challenged the sufficiency of the evidence that supported the fourth degree assault instruction. Considering the defendant's sour grapes, the Court cited to *State v. Fowler*, which states that:

> "it is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." 114 Wash.2d 59, 67, 785 P.2d 808 (1990).

Here, despite his argument on appeal that only minimal contact occurred, Johnson's theory was he did nothing. At trial, he testified that he did not intentionally assault the victim and protected party, Angela Lingle. RP 319, 326. In fact, he stated he did not strike her and did not assault her. RP 326. In closing, defense argued that Lingle constructed the violations,

that she wielded power over Johnson, and that he should be forgiven for this imbalance of power. RP 351-355. Either theory contradicts any other theory that would justify a lesser included of Assault in the Fourth degree. It also contradicts the evidence presented by the State that he assaulted Angela Lingle on multiple occasions during a singular event, all in violation of a no-contact order. Viewed in the light most favorable to the State, the evidence is clear that Johnson's argument does not meet the second prong of the Workman test. Consequently, he was not entitled to the instruction.

2. Johnson has not shown the prosecutor's comments were both flagrant and ill-intentioned

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wash.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists when there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wash.2d 44, 52, 134 P.3d 221 (2006). Because Johnson did not object to the alleged improper conduct, the error is considered waived unless the conduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice incurable by a jury instruction. *State v. Stenson*, 132 Wash.2d 668, 719, 940 P.2d 1239 (1997); *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

This is a heightened standard of review, which requires Johnson to show that (1) no curative instruction would have obviated any prejudicial effect on the jury, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *State v. Emery*, 174 Wash.2d 741, 761, 278 P.3d 653 (2012)(*quoting State v. Thorgerson*, 172 Wash.2d 438, 455, 258 P.3d 43 (2011)).

In analyzing a prosecutorial misconduct claim, the court should focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. Emery, 174 Wash.2d at 762. The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a defendant from a fair trial. Id.

Comments made by a prosecutor during closing argument are reviewed in context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Thorgerson*, 172 Wash.2d at 462, 258 P.3d 43. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wash.2d 51, 94-95, 804 P.2d 577 (1991).

The State's closing argument included a discussion of the relationship between Johnson and the victim, Angela Lingle. In her direct,

Lingle discussed the cycle of violence between her and Johnson, the ups and downs, the good the bad, the ties that held her loyal to the relationship and to Johnson. Lingle described the relationship as "excellent and great until he's on methamphetamine, and then it's scary and traumatic," where Johnson is "mentally, emotionally, and very physically abusive." RP 92. She described a relationship that was difficult to leave, even while Johnson was abusive. RP 92-3.

In recognition of the questions a jury might have in response to Lingle remaining in a relationship that was filled with verbal and physical abuse, the prosecutor purposefully discussed the cycle of ongoing domestic violence within the relationship, the assault in violation of the no-contact order, and then the argument transitioned to a discussion of the two counts of Tampering with a Witness, Domestic Violence. Johnson focuses on a specific phrase rather than the context of the phrase.

> "So, with knowledge of the no-contact orders, with having been previously convicted of them—of violating them twice, and assaulting her in violation of no-contact orders…he chose to kick in the door, he chose to push her into the tub, he chose to grab her arm, he chose to punch her in the head, he chose to yell at her as she's calling 911. Like a true abuser, he chose to ask her to fix it. And over the course of the months he's calling her---calling her on the phone, telling her not to testify about how it went down because he's not going to be in her life if he—if he goes down for it. Don't show up for court, I'm not going to be in your life. You don't have a relationship if I get found guilty.

> Well, let's set them both free from this penitentiary, okay? This is a relationship that should not continue. Please find them both—find him guilty of both counts of the violation no-contact order, find him guilty of that obstructing, and find him guilty of those two tampering with a witness. Thank you." RP 350-351.

In context, the State repeats Johnson's requests of Lingle to avoid talking with the prosecutor, avoid trial, avoid testifying against him, requests that were threats. The argument refers specifically issues of domestic violence as discussed in voir dire. *See State v. Magers*, 164 Wash.2d 174, 192, 189 P.3d 126 (2008)(where prosecutor discussed the dynamics of domestic violence relationship was not so egregious to warrant reversal). Unlike in *Magers*, the prosecutor here argued from facts that were in evidence.

Johnson also chooses to focus only upon the claimed improper remarks rather than considering the context of the State's rebuttal argument. The argument was rebuttal to defense remarks, which suggested the victim, Angela Lingle, held the power in the relationship and that she tricked Johnson into violating the orders, therefore, losing credibility. RP 351-355. It focused on Ms. Lingle's description of her relationship with Johnson, and the reasons she could not leave him despite his abusiveness. RP 92-3.

> "When we're going to talk about how a person acts on stand in consideration of their credibility as a witness, you look at "any personal interest that the witness might have in the outcome of the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all the

other evidence." There are some other things for you to—that you can look at when you're thinking about credibility, but I think those are three very, very pertinent things for you to consider.

"Any personal interest that the witness might have in the outcome of the issues." Someone gets up on the stand and says a story that isn't supported by any of the evidence and yet they're on trial, how is that reasonable in light of all the evidence? And, too, let's take a look at their personal interest."

"Any bias or prejudice that the witness may have shown." Angela gets up on the stand. She's like, I wanted to marry him. I was with him for eight years. I still want to marry him. I just don't want him to be a drug addict. I want him to be a good father to my daughter and to be the man that he should be. Did you hear any hate from her? Did you hear any vindictiveness from her? She invites him? No. They're living together. They are trying to work on it, as she said. And, yeah, it's in violation, but that's his fault, not hers.

"You can be arrested even if the person who obtained the order invites or allows you to violate the order's prohibitions." Guess what, bold print, second page. You are aware of it, Mr. William Johnson, because you signed that piece of paper. Not her fault. She's just trying to do what she knows best to hold together a rat's nest, penitentiary-type relationship. This thing holds her prisoner. She's got a child with this man.

"The reasonableness of the witness's statements in context of all the other evidence." I didn't—I didn't assault her; I didn't do anything. I may have kicked the door in a few days later—earlier. That's not what the evidence says. The evidence says is that Angela got grabbed in the arm; you can see the bruise. The evidence said that there were red marks on her—that she appeared to have redness on her chest. You heard two officers tell you that. The evidence said that she had blood on her ear from being punched. As she said, she was punched. You can see the photo. She was outside the house. Who wants to be outside the house at eight or so in the morning on July 4th, calling 911? Who? Only a person who'd been assaulted in violation of a no-contact order." RP 358-59.

Johnson did not object at trial to either instance. RP 350. The absence of an objection strongly suggests that the argument did not appear critically prejudicial to the appellant in the context of the trial. *State v. McKenzie*, 157 Wash.2d 44, 53 n.2, 134 P.3d 221 (2006). Be that as it may, because they must tailor their rebuttal argument to defense's closing argument, prosecutors are given wide latitude to respond to defense arguments in closing. *State v. McKenzie*, 157 Wash.2d 44, 134 P.3d 221 (2006). Here defense blamed Ms. Lingle for the crimes Johnson was accused, claiming it was a power struggle she liked:

> "She likes that no-contact order. Even on the telephone it's, well, you know, you're going to change—no, I like that no-contact order just the way it is. She likes it just fine because whenever he gets out of line she calls the police. Who's spending all the time in jail? He is.
>
> That's the beauty about this. The beauty is Will, he thinks he got the power. He doesn't have the power. She comes up here; she's a good victim. She cries and cries and cries. Not when I'm ask—asking her questions, she's not crying all. Not a bit…
>
> Who go the power here? She got the power. She likes the no-contact order game. It benefits her. it's unbelievable. He falls for it every time. He falls for it because he's the one that gets arrested, not her. Even though they're in violation and find them both guilty, you cant do that. He's the only one who's spending time in jail. Only he is. Who's go the power here? She got the power." RP 352.

The State's argument addressed the issues of power. A prosecutor is entitled to make a fair response to defense counsel's arguments. *State v. Gauthier*, 189 Wash.App. 30, 37-8, 354 P.3d 900 (2015)(*citing State v.*

Brown, 132 Wash.2d 529, 566, 940 P.2d 546 (1997). Whether clumsy in execution, or not, the State is permitted to address the argument defense applies. Here the State was confronted with a disturbingly jaded view of Ms. Lingle as a victim and her pursuit to use a protective order to control Johnson, either by threat or incarceration. Defense argued she imprisoned him, therefore the prosecutor argued the opposite, and did so in context of the jury instructions. The State referred to WPIC 1.02 to argue Ms. Lingle lacked bias and vindictiveness.

The jury is presumed to follow the trial court's instructions. *State v. Stein*, 144 Wash.2d 236, 247, 27 P.3d 184 (2001); Gauthier, 189 Wash.App. at 39, 354 P.3d 900. Before the prosecutor and defense ever argued, the trial court instructed the jury that the attorneys' arguments are not evidence, that it was obligated to reach a decision based on the facts as applied to the law, and that it was not to base its decision on sympathy, prejudice, or personal preference:

> "the lawyer's remarks, statements, and arguments are intended to help [them] understand the evidence and apply the law. *It is important, however, for you to remember that the lawyer's statements are not evidence.* The evidence is the testimony and the exhibits. The law is contained in my instructions to you. *You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.*"
>
> WPIC 1.02 (emphasis added).

Johnson has not shown the arguments were so flagrant and ill-intentioned that they caused enduring and irreparable prejudice.

Even if he was able to establish they were improper, Johnson failed to show that an objection and curative instruction would have neutralized any prejudice. Consequently, his claim is waived. *Stenson*, 132 Wash.2d at 718-19, 940 P.2d 1239.

3. Johnson failed to show his right to a public trial was violated

A criminal defendant has a right to a public trial under both the United States Constitution and the Washington State Constitution. *State v. Lormor*, 172 Wash.2d 85, 90-91, 257 P.3d 624 (2011). Whether this right has been violated is a question of law to be reviewed de novo. *State v. Wise*, 176 Wash.2d 1, 9, 288 P.3d 1113 (2012).

To answer the question of whether the right has been violated, the reviewing shall conduct a three-part inquiry, asking (1) does the proceeding at issue implicate the public trial right? (2) if so, was the proceeding closed? And (3) if so, was the closure justified? *State v Smith*, 181 Wash.2d 508, 334 P.3d 1049 (2014).

To determine whether the public trial right attaches to a particular proceeding, the court applies the experience and logic test. *Smith*, 181 Wash.2d at 511, 334 P.3d 1049 (*citing State v. Sublett*, 176 Wash.2d 58, 72,

292 P.3d 715 (2012)). Under the experience prong, the court asks whether the proceeding at issue has historically been open to the public. *Sublett*, 176 Wash.2d at 73, 292 P.3d 715. Under the logic prong, the court asks whether public access plays a significant positive role in the functioning of the particular process in question. Id. If both prongs are satisified, the public trial right attaches.

Sidebars do not implicate the public trial right under the experience and logic test "because sidebars have not historically been open to the public and because allowing public access would play no positive role in the proceedings. *Smith*, 181 Wash.2d at 511, 334 P.3d 1049. Sidebars that address legal challenges and evidentiary rulings and are so devoted to legal complexities that they are "practically a foreign language" are proper sidebars. Id. at 518-19, 334 P.3d 1049. Proper sidebars address mundane issues which implicate little public interest, are used to avoid disrupting the flow of trial, and are performed on the record or promptly memorialized in the record. Id. at 516.

Here, Johnson highlights nineteen separate instances he believes to implicate and violate his public trial rights. The court record distinguishes between sidebar conversations and off-record conversations, or private conversations between Johnson and his counsel. Private conversations between defense counsel and defendant should not be subject to open-courts

review because they are protected by attorney-client privilege, and necessarily have never been open to the public. *See* RCW 5.60.060(2)(a).

The record indicates only one sidebar conversation occurred during the entire trial. RP 169. This conversation preceded a lengthy motion for mistrial, following a mistaken and abbreviated disclosure of an additional jail call between Johnson and the victim, Ms. Lingle. RP 169-71. The trial court had admonished the jury to disregard what it had heard, that it was not evidence, and to base its decisions only on evidence that was rightfully admitted at trial. Nevertheless, defense counsel made a sidebar motion for mistrial, which was then followed by an on-record motion. Consequently, the sidebar at issue was promptly memorialized through a thorough motion for mistrial. *Smith*, 181 Wash.2d at 516.

Johnson then argues the normal conversations between himself and his counsel as those necessary for reproduction. These are protected. Some of these conversations were during trial, RP 148 (where defense counsel apologized to trial court for discussing matters with his client), RP 153 (a conversation between Johnson and his defense counsel, following the close of trial for the day), RP 163, RP 305 (presumptive tactical discussion between defense counsel and Johnson prior to defense opening statement), and RP 362 (discussion between Johnson and his counsel, following close

of trial, where defense counsel placed on record an objection before informing the trial court he would be reachable at his office).

Johnson also argues that the State's search for evidence and the procedural reveal of exhibits, between counsel, during the admission of evidence, should be subject to the open courts doctrine. These are not conversations between the court and counsel, nor do they present any consequence to the trial. The specific moments Johnson highlights are clearly defined by the record: defense review of photographs and exhibits with Johnson, RP 33; and the prosecutor delivers the intended evidence to defense counsel to review prior to entry, RP 36; the prosecutor searches for Exhibit 6, a copy of a no-contact order, during his direct examination of the victim and protected party, Ms. Lingle.

Johnson also claims an off-record discussion that is not on the record. He argues a conversation occurred during the direct examination of Deanna Wells. However, the record does not indicate such an off-record conversation occurred on RP 35.

Finally, Johnson claims multiple, unrecorded conversations occurred during his sentencing hearing. Multiple, private and protected conversations between Johnson and defense counsel did occur, but they did not involve the trial judge nor did they involve the state. *See* RCW 5.60.060(2)(a).

Even if Johnson were able to show his public trial right was violated, he failed to show a closure occurred. There are two types of closures. The most obvious occurs when the "courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *Lormor*, 172 Wash.2d at 93, 257 P.3d 624. The other type of closure occurs where a portion of the trial is held someplace inaccessible to spectators, usually in chambers. Id. Where the public can oversee and scrutinize the fairness of any particular jury trial, despite sidebar conversations, no closure has occurred. *State v. Love*, 183 Wash.2d 598, 606-7, 354 P.3d 841 (2015). Johnson can have no complaint about a closure—every aspect of his trial was performed in the courtroom, open to the public.

4. The trial court did not error by denying Johnson's mid-trial motion to suppress

a. Johnson's motion was untimely

Johnson contends he was denied a mid-trial motion to suppress evidence. The record suggests no actual motion to suppress was made during the course of trial. Be that as it may, a motion to suppress must be timely. *State v. Baxter*, 68 Wash.2d 416, 423, 413 P.2d 638 (1966). A defendant must move for suppression within a reasonable time before the case is called for trial. *State v. Robbins*, 37 Wash.2d 431, 432, 224 P.2d 345(1950); *State v. Burnley*, 80 Wash.App. 571, 572, 910 P.2d 1294 (1996).

If a criminal defendant wants to keep evidence from the jury, he must act before the State offers that evidence. *Burnley*, 80 Wash.App. at 573, 910 P.2d 1294.

The issue at hand occurred after the State had presented testimony from multiple witnesses. During cross examination of Officer Terry Reece, the State's sixth witness against Johnson, defense counsel attempted to inquire whether or not responding officers had obtained a warrant for entry into the apartment. The state objected as to relevance. Defense counsel argued he was permitted to enquire because he believed the police did not have probable cause to enter the home. RP 76. Despite this belief, defense counsel did not make a motion to suppress any evidence, at that time; he merely wanted the opportunity to enquire about the warrant. RP 77. The court denied him the opportunity for such enquiry, because of timing--it was made six witnesses into the trial—because it was inflammatory, and because it confused the jury with legal issues it should not be required to sift through. RP 78. Nevertheless, the evidence was already presented to the jury, thus obviating any motion to suppress. *Burnley*, 80 Wash.App. at 573.

b. Exigent circumstances existed

At trial, Officer Reece testified he had concern Johnson may have obtained a weapon, while moving in and out of his visual range. This created a distinct concern for officer safety and other individuals present at the

apartment complex. Washington Courts have long held that danger to the arresting officer or to the public can constitute an exigent circumstance. *State v. Counts*, 99 Wash.2d 54, 60, 659 P.2d 1087 (1983). The existence of an exigent circumstance is determined by looking at the totality of the situation in which the circumstance arose. *State v. Carter*, 151 Wash.2d 118, 128, 85 P.3d 887 (2004). Typically, Courts will review six factors to guide their analysis:

> (1) The gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry can be made peaceably.

State v. Cardenas, 146 Wash.2d 400, 47 P.3d 127 (2002). Because courts analyze the totality of the situation, circumstances may be exigent even if they do not satisfy every one of the six listed elements. Id. at 408, 47 P.3d 127.

Here, the facts that are available from the record are that officers responded to a report of domestic violence, including an assault in violation of a NCO. They had a brief discussion with the reporting party, who also happened to be the victim. There was concern Johnson may have armed himself when he went out of Officer Reece's view and into the kitchen. While there was no likelihood Johnson would escape because the officers

had all doors to the apartment covered, entry was able to be performed peaceably.

Officers did not use a pre-text to enter the apartment. They responded to a report of ongoing domestic violence and were executing their responsibilities under RCW 10.31.100(c). A felonious assault was alleged to have occurred within four hours of their arrival and there was some evidence of bodily injury. Because of that, they executed a warrantless arrest of Johnson. Officers made numerous requests of Johnson to exit the apartment. He refused, while concurrently moving from the living room to the kitchen. There was concern he may have obtained a knife. The concern for the weapon increased the exigency.

5. It was not error to deny Johnson's half-time motion to dismiss

a. Johnson testified on his case in chief eliminating his right to appeal the decision

Johnson appeals the trial court's denial of his motion to dismiss the charge of obstruction. When a court is asked to examine the sufficiency of the evidence, it will do so using the best factual basis available to it at the time of the motion. *State v. Allan*, 88 Wash.2d 394, 396, 562 P.2d 632 (1977)(defendant waived his challenge to the sufficiency of the State's case by putting on evidence in his own behalf after the court denied his motion to dismiss). For this reason, a defendant who presents a defense case in chief

may not appeal the denial of his motion to dismiss. *State v. Jackson*, 82 Wash.App. 594, 608-9, 918 P.2d 945 (1996).

Johnson is bared from appealing the trial court's ruling by nature of having testified on his own behalf. RP 307-31.

b. Sufficient evidence existed to convict on obstructing charge

Evidence is sufficient if, when viewed in a light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). The Court should not reweigh the evidence and substitute its judgment for that of the jury. *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980) Courts should defer to the jurors' resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given the evidence, because they observed the witnesses testify first hand. *See State v. Walton*, 64 Wash.App. 410, 415–16, 824 P.2d 533, review denied, 119 Wash.2d 1011, 833 P.2d 386 (1992).

A person is guilty of obstructing a law enforcement officer if he willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her duties. RCW 9A.76.020.

Evidence showed that Johnson willfully remained inside the apartment after officers made multiple requests for him to exit. But moreover, when Johnson was taken to the patrol vehicle, he made several attempts to prevent officers from placing him inside the patrol car. Either effort made the discharge of the officers' official duties difficult. The Jury agreed with these facts and found Johnson guilty, after he testified on his own behalf.

6. Johnson received effective assistance of counsel

Johnson claims he received ineffective assistance of counsel because his attorney failed to bring a motion to suppress evidence associated with his gross misdemeanor charge of obstructing a law enforcement officer, under RCW 9A.76.020. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In evaluating alleged ineffective assistance of counsel, courts apply the two-prong *Strickland* test. Johnson must show that (1) defense counsel's performance fell below an objective standard of reasonableness considering all the circumstances; and that (2) there is a reasonable probability that, but for the errors, the result of

the proceeding would have been different. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; State v *McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995).

a. It was reasonable for defense counsel not to file a Pre-trial Motion to Suppress

Defense counsel made oral motion following the State's presentation of evidence, to permit enquiry into whether or not a warrant had been obtained. Defense counsel then made an untimely, oral request for evidence of obstruction to be suppressed.

There is a strong presumption that defense counsel's representation was effective. *State v. Brett*, 126 Wash.2d 136, 198, 892 P.2d 29 (1995). The defendant must show from in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct. *State v. Thomas*, 109 Wash.2d 222, 226, 743 P.2d 816 (1987); *McFarland*, 127 Wash.2d at 336, 899 P.2d 1251 (*overruling State v. Tarica*, 59 Wash.App. 368, 798 P.2d 296 (1990)).

When a motion is brought on direct appeal, courts will not consider matters outside the trial record. *State v. Crane*, 116 Wash.2d 315, 335, 804 P.2d 10, *Cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991). Johnson has raised an issue that requires facts which were not necessarily relevant to the testimony and do not exist on the record.

Consequently, raising this issue is more appropriate for a personal restraint petition. 127 Wash.2d at 335. However, Johnson has not filed a PRP, thus the issue should be determined by the record. Id.

Be that as it may, there may be legitimate strategic or tactical reasons why a suppression hearing is not sought prior to trial. 127 Wash.2d at 335. Based on the above facts elicited at trial, it is clear the officers were justified in entry of the apartment and any motion to suppress evidence of obstructing would have failed. Even though defense counsel made enquiry into the circumstances of the entry and probable cause, he may have reasonably concluded prior to trial that a motion to suppress was without merit. Consequently, defense counsel's performance was not deficient.

Even if the court finds Johnson has shown defense counsel's performance was deficient, he has not shown that the result of the proceeding would be different. Again, the court must determine from the facts on the record whether or not a motion to suppress would have succeeded. The facts elicited at trial indicate an on-going domestic dispute, Johnson was reluctant and obstreperous, unwilling to respond to officers' commands, and an officer's concern Johnson may have armed himself with a knife. Based on these facts, and only these facts, the court cannot determine the outcome of Johnson's proceeding would have been different.

b. Defense counsel moved for a mistrial

Johnson also contends he received ineffective assistance of counsel for failure to move for a mistrial following the inadvertent introduction of an innocuous, uncharged portion of a phone call between himself and the protected party. RP 163-69. However, defense counsel promptly moved for a mistrial. RP 170. The trial court denied the motion, finding its earlier admonishment of the jury to disregard the conversation was sufficient to ameliorate any prejudicial effect. The court did not find anything that was played to the jury to be extremely prejudicial or even significant. RP 171.

There is a strong presumption of effective assistance of counsel, and this record shows that is what Johnson received.

7. No hearing was performed regarding Johnson's ability to pay legal financial obligations

A trial court cannot impose legal financial obligations without an individualized hearing, determining whether a defendant has the present or future ability to pay. RCW 10.01.160(3); *State v. Blazina*, 182 Wash.2d 827, 834, 344 P.3d 680 (March 12, 2015). As appellant suggests, a hearing determining whether he had the present or future ability to pay non-mandatory costs did not take place. RP 380-82. However, no non-mandatory costs were imposed. CP 53. Johnson was required to pay the

Victim assessment, RCW 7.68.035 (there shall be a imposed by the court); the criminal filing fee and the jury demand fee, RCW 10.46.190 (every person convicted of a crime or held to bail to keep the peace shall be liable to all costs of the proceedings against him); and the DNA collection fee, RCW 43.43.7541 (every sentence imposed for a crime listed under 43.43.754 must include a fee of one hundred dollars). No other fees and fines were imposed.

We defer to the court whether a hearing must be conducted at the trial court level to determine his present or future ability to pay mandatory fees is necessary under *Blazina* and 10.01.160(3).

III. CONCLUSION

For the above stated reasons, the State respectfully requests the Court deny Johnson's appeal.

Respectively submitted this 27th day of September, 2017.

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Prosecuting Attorney

By _____
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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on Sept 27th, 2017.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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